UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FIRSTENERGY GENERATION, LLC	)	
	)	
	)	
and	)	Case No. 06-CA-121513
	)	
	)	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 272, AFL-CIO	)	

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. STATEMENT OF THE CASE

A. Introduction

A Complaint was issued by the General Counsel on June 30, 2014, against FirstEnergy Generation, LLC ("FirstEnergy"), based upon an unfair labor practice charge filed on January 29, 2014, by the International Brotherhood of Electrical Workers, Local Union No. 272, AFL-CIO ("Union"). The Complaint alleged that FirstEnergy violated Section 8(a)(5) of the Act "by refusing to provide the union with…requested retiree benefits information." (ALJD at 1).

On January 23, 2015, Administrative Law Judge David I. Goldman issued a Decision in which he rejected FirstEnergy's position that the requested retiree information was not relevant to the negotiations with the Union for a new labor agreement, and found that FirstEnergy's actions violated the Act. FirstEnergy has excepted to portions of the judge's

Decision. This brief is in support of the position taken by FirstEnergy in its Exceptions filed with the Board.

II. STATEMENT OF FACTS

A. Background

FirstEnergy is headquartered in Akron, Ohio, and operates an electricity generation facility in Shippingport, Pennsylvania, which is the Bruce Mansfield plant. The Union has represented the production and maintenance employees at the Bruce Mansfield plant for many years. The most recent collective bargaining agreement between the parties was effective from December 5, 2009, through February 16, 2013. By Memorandum of Agreement dated August 16, 2012, FirstEnergy and Union amended the existing agreement and extended it to February 15, 2014. (The 2009-2013 collective bargaining agreement, as amended and extended, will be referred to below as the 2009 Agreement). (ALJD at 2-3).

The 2009 Agreement provided that employees who retired on or after February 16, 2008, were entitled to health care coverage from FirstEnergy "in accordance with the terms and conditions of the plan in effect for active employees." FirstEnergy refers to employees who continued to participate in the active unit employee plan until expiration of the collective bargaining agreement under which they retired as "in-the-box" retirees. (ALJD at 3).

An in-the-box retiree comes "out of the box" at the expiration of the collective bargaining agreement under which they retired. These "out-of-the-box" retirees then are eligible to receive health care under the terms of the FirstEnergy Healthcare Plan available to non-bargaining unit employees and "eligible retirees." (ALJD at 3).

The first bargaining session was held on December 19, 2013, more than two months before the expiration of the 2009 Agreement. Additional meetings were held in January

and February 2014. The chief spokesperson for FirstEnergy was Tony Gianatasio; the Union's chief spokesperson was Herman Marshman, Jr. (ALJD at 3).

It was stipulated at the hearing before the administrative law judge that between December 19, 2013, and the date of the hearing, the Union made numerous requests for information in connection with the ongoing negotiations on a variety of issues, that FirstEnergy provided many responses, and that the only requests at issue are the ones set forth in the Complaint before the administrative law judge. (Tr. 128-129).

At the initial bargaining session on December 19, 2103, FirstEnergy presented a document to the Union which was entitled, "Company Interest Discussion Document" (GCX-11). The purpose of the document was to lay out what FirstEnergy was seeking to modify in the expiring 2009 Agreement. The third item read as follows: "Article XVIII Section 3 Retire Health: end the retiree medical box." Article XVIII, Section 3 set forth the "box." As noted by the administrative law judge, the box "set forth the amount of the Employer's contribution toward medical and prescription drug coverage for such employees who retire during the term of the agreement and continue to participate in the health care plan available to active employees." (ALJD at 3). The proposal to "end the retiree medical box" was understood by FirstEnergy and the Union as a proposal to end FirstEnergy subsidies toward retiree medical care for "in-the-box" retirees under a new successor labor agreement. (ALJD at 4).

B. The Retiree Information Request

At a bargaining session on January 27, 2014, the Union presented FirstEnergy with a request for information regarding retiree health insurance. The request had seven items; only four of them are involved in the instant matter.

Marshman initially testified on direct examination at the hearing that he requested the information "to help me and assist me in--to formulate proposals." (Tr. 31).

The items requested were the following:

- -- FirstEnergy's "total cost for retiree health insurance" (item 2);
- -- FirstEnergy's "cost for health insurance for 272 retirees from the Bruce Mansfield Plant" (item 4);
- -- The number of "retirees from the Bruce Mansfield Plant [who] are over the age of 65 using health insurance and ... the cost to the Company" (item 5); and
- -- The number of "retirees from the Company [who] are over age 65 and using health insurance and ... the cost to the company" (item 6).

Marshman further testified on direct examination that the above request was for FirstEnergy "to provide information ... to make assessments on what the current cost for providing healthcare to the retirees." (Tr. 35). Later, on cross-examination, Marshman admitted that he was asking for information for "all FirstEnergy retirees", including retired management employees. (Tr. 61) (Emphasis supplied). Marshman further admitted that there were approximately 10,000 current retirees across the entire parent company and its subsidiaries, and numerous current retirees were former union employees covered by other collective bargaining agreements with other unions. (Tr. 60-61). Marshman then stated that he needed the information about "10,000 currently-retired" former employees for the following reason:

> "I need to look at the difference from the costs for the entire company's--what was being paid for retirees, and I needed to compare it with the costs specific for the retirees at our facility, and look how.
>
> Also, with the various negotiations, meaning that no contract in FirstEnergy is the same; okay? Some employees are carrying benefits as far out as 2017, where others employees, current benefits ends as early as ... December 31st, 2014.

> So the magnitude of the company terminating these subsidies, I needed to have an exact picture of what I would counter to the company in opposition to elimination or terminating this subsidies, this benefit for our employees."

(Tr. 76).

Eleven days later, by letter dated February 7, a voluminous amount of information was provided to the Union by Gianatasio in response to the request dated January 27. This February 7 response provided the requested cost information for in-the-box retirees from the Bruce Mansfield plant for 2012 and 2013. (GCX-7, at Attachment 1). This was part of item 4 of the January 27 request. FirstEnergy also provided the information requested in item 5, which was the number of retirees at the Bruce Mansfield plant over 65 using health insurance who were in-the-box; the cost information was provided in Attachment 1.

As stated by Gianatasio at the administrative law judge hearing, the information provided to the Union on February 7 was "relevant to our proposal because it gives a--gives a good idea of what the value of--of that in-the-box benefit is worth." (Tr. 122-123). He continued that "having knowledge of the cost of the in-the-box retiree medical--medical costs, if you will, is relevant to what we're proposing." (Tr. 123). On the other hand, Gianatasio testified that in terms of the FirstEnergy proposal to end the retiree medical box, the proposal "doesn't impact out-of-the-box retirees in any manner," since the proposal "deals with future retirees." (Tr. 121).[1]

Six months after receiving FirstEnergy's response on February 7, the Union again requested the following: "Total cost of pre-Medicare, and post-Medicare retiree healthcare." FirstEnergy responded on August 19 with more detail regarding Local 272 in-the-

[1] All of Gianatasio's testimony at the hearing was undisputed; he was not cross-examined by the General Counsel or the Union, and there was no rebuttal testimony. (Tr. 131).

box retirees: It provided the Union with the costs for pre-Medicare and post-Medicare for in-the-box retirees from 2008 to 2013. (ALJD at 7; RX-2; RX-3).

III. APPLICABLE BOARD CASE LAW

The applicable Board case law is well-settled and can be summarized as follows.

In Ethicon, 360 NLRB No. 104 (May 5, 2014), the Board recently affirmed an administrative law judge's dismissal of a similar complaint involving a failure to provide non-unit information. In Ethicon, the Board stated that when a union's requested information is not "presumptively relevant," it is "the union's burden to demonstrate relevance." 349 NLRB No. 104, slip op. at 6. Where the requested information "concerns matters outside the bargaining unit," the Board previously stated that such information is not presumptively relevant, and a union therefore has the burden "to demonstrate the relevance of and necessity for the information." Saginaw Control and Engineering, Inc., 339 NLRB 541, 544 (2003). More specifically, in relation to the type of retiree information at issue in the instant matter, in Connecticut Light and Power Company, 220 NLRB 967 (1975), the Board stated as follows:

> "It is well-settled that an employer is not obligated to bargain as to pension or other benefits for retirees since retirees are not part of an appropriate bargaining unit. Where a union requests information pertaining to individuals not in the bargaining unit, it bears the burden of establishing that the information is relevant and necessary for purposes of bargaining for employees in the bargaining unit."

In its recent decision in Ethicon, 360 NLRB No. 104, slip op. at 6, the Board noted that a union satisfies the burden set forth above "by demonstrating a reasonable belief, that is also supported by objective evidence, that the requested information is relevant." The Board stated in Dodger Theatrical Holdings, Inc., 347 NLRB 953, 967 (2006), which was cited by the

administrative law judge, that a belief is not "reasonable" where it is "not based on objective facts, but rather suspicion, surmise, conjecture or speculation."

The Board in Ethicon further relied upon its 2007 decision in Disneyland Park, 350 NLRB 1256 (2007). In Disneyland, the Board dismissed a complaint involving a refusal to provide non-unit information, and set forth the following burden for the General Counsel to satisfy in cases such as the instant matter:

> "To demonstrate relevance, the General Counsel must present evidence either (1) that the union demonstrated relevance of the non-unit information, or (2) that the relevance of the information should have been apparent to the Respondent under the circumstances. ... Absent such a showing, the employer is not obligated to provide the requested information."

350 NLRB at 1258 (internal citations omitted).

The Board further noted in Disneyland that a union's "explanation of relevance" must be made with "some precision," and that a "generalized, conclusory explanation is insufficient to trigger an obligation to supply information." 350 NLRB at 1258, n.5. (Emphasis supplied).

IV. STATEMENT OF THE QUESTION INVOLVED

A. Whether the Administrative Law Judge erred when he concluded that the Union satisfied its burden of demonstrating the relevance of the requested information, and that FirstEnergy's failure to provide the information therefore violated the Act.

B. Whether the Administrative Law Judge erred when he rejected and failed to consider Respondent's proposed Exhibit 5.

V. ARGUMENT

A. THE ADMINISTRATIVE LAW JUDGE ERRED WHEN HE CONCLUDED THAT THE UNION SATISFIED ITS BURDEN OF DEMONSTRATING THE RELEVANCE OF THE REQUESTED INFORMATION, AND THAT FIRSTENERGY'S FAILURE TO PROVIDE THE INFORMATION THEREFORE VIOLATED THE ACT.

In his decision, the judge stated that under Board case law, the Union had the burden of demonstrating that the non-unit information was relevant to the collective bargaining negotiations taking place in early 2014. The judge stated that the Union satisfied its burden when it told FirstEnergy that the information was needed "to formulate proposals with regard to future retirees (i.e., the current employees)." (ALJD at 6). In his Decision, the judge later stated that the Union explained its request with "precision," which was that the information was needed to "formulate proposals for its unit members' retiree benefits." (ALJD at 11).

Contrary to what was concluded by the administrative law judge, the evidence established that the Union completely failed to satisfy its burden, which was exclusively presented to the judge through the testimony of the Union's lead negotiator, Herman Marshman. The Board should instead conclude, as it did in Disneyland Park, 350 NLRB 1256, 1258 (2007), that: "The Union failed to adequately support the relevance of the information."

The Union, as stated by Marshman, wanted the "cost for health insurance" and the "number of retirees from the Company [who] are over 65 and using health insurance" for all out-of-the-box retirees, or as Marshman testified, "All FirstEnergy Retirees," numbering some 10,000 current retirees. (Tr. 60, 62). This includes former executives, managers, and those employees formerly represented by one of the many other unions who have collective bargaining relationships with FirstEnergy. When Marshman went beyond his generalized and imprecise statement in his direct testimony about a need to help the Union "formulate proposals," what he

later said, on cross-examination, was that the Union wanted to see "what was being paid" for all Company retirees so the Union could "compare it with the costs specific for the retirees at our facility." (Tr. 31; 76).

FirstEnergy notes that in his Decision, the judge stated that, to him, it "seems obvious--as much by common sense as precedent," that in the context of a discussion about future retiree benefits for current retirees, "The information most likely to be relevant is information on the benefits for current retirees." (ALJD at 9). The judge then proceeded to elaborate upon what he believed could have been the basis for the information requested by the Union. See ALJD at 9, lines 37 to 50. All of that is very well. But it highlights the problem perfectly: if the judge was able to articulate reasons why the information might have been necessary, the Union – with a burden to explain extra-unit information requests with precision – should have been able to do the same.

FirstEnergy submits that it was erroneous for the administrative law judge to justify his conclusion about the Union's burden by his own general view--unsupported by the record--that it was "obvious" why the information was relevant. Under Board case law, it was the Union's burden to provide "a sufficient factual basis to establish relevance at the time the information request was made." Disneyland Park, 350 NLRB at 1259. (Emphasis supplied). The Board stated in The New York Times Company, 270 NLRB 1267, 1275 (1984), that the Union's proof must be more than a "mere concoction of some general theory which explains how the information would be useful to the Union." FirstEnergy submits that this is equally applicable to the judge's effort to apply his notion of "common sense" to explain the basis for the Union's request--it was merely the judge's own "general theory." As such, it should be disregarded by the Board.

When the Board reviews the evidence actually presented by the Union rather than that which was put forward by the administrative law judge, three specific points can be made to show that the Union failed to carry its burden under the case law.

First, in early 2009, in the context of negotiations for what became the 2009 Agreement, the Union asked for the same information, and received the same response from FirstEnergy. (RX-1; Tr. 42). While the judge stated that this was "probative of nothing," FirstEnergy believes that it is quite important when assessing the "objective facts" about whether the Union's belief regarding the information is reasonable. (ALJD at 11). Dodger Theatricals, 347 NLRB at 967. It indicates that this extra-unit information was not quite as important as the Union claimed it to be.

Second, at the hearing it was shown that early in this proceeding, Marshman swore under oath, in his affidavit in support of the charge that the request on January 27 was "site specific to the employer's Bruce Mansfield Shippingport Plant Pennsylvania location, for the years 2011, '12, and '13." (Tr. 52). (Emphasis supplied). Further, he later admitted that he said in his Affidavit that the information was "not plant specific, which is how I asked for the information." (Tr. 57) (Emphasis supplied). These sworn statements Marshman provided in support of the charge directly contradict Marshman's testimony at the hearing, where he admitted that he was asking for "all FirstEnergy retirees," across the entire company – not site specific at all. (Tr. 61). The judge completely, and erroneously, ignored this inconsistency. This directly bears upon the Union's burden to prove that it gave precise reasons as to why it wanted the information, a burden bottomed solely upon Marshman's testimony (ALJD at 7).[2]

[2] Marshman's credibility was called into question in 2014 in an unrelated Board matter involving the parties, FirstEnergy Generation Corp., Case 06-CA-092312 (Jan. 17, 2014), where the judge stated that Marshman's testimony was "not sufficiently reliable," and his "demeanor while testifying was not impressive." (ALJD at 6).

Third, FirstEnergy *did* provide "site-specific" information for the Bruce Mansfield plant for 2008 to 2013 about FirstEnergy contributions for the in-the-box retirees and the number of those retirees over the age of 65. (GCX-7; RX-3).

All of the above points show that in 2009, the information was not so critical to the Union, but in 2014, when the same information was requested again, it was really intended to be a "site specific" request for the Bruce Mansfield facility--which is exactly what was provided by FirstEnergy. Even according to his own testimony, Marshman said what he needed was to know "what was being paid" for retirees. (Tr. at 76). Taking this into consideration, the fair conclusion to reach is that, contrary to the administrative law judge, the Union received all that it needed to negotiate a proposal to "end the retiree medical box" in a successor agreement. It received five years of data about the in-the-box retirees at the Bruce Mansfield facility, who were formerly represented by the Union. Information about 10,000 out-of-the-box retirees (such as former managers at the Akron headquarters, or a former utility worker under another union's collective bargaining agreement), is neither "site specific" nor relevant under the applicable case law.

Similarly, the Union is required to state the reason why it wants certain information with "some precision." Disneyland, 350 NLRB at 1258. Yet at no point in time in the actual negotiations did Marshman ever explain why he wanted the information. He simply stated that he wanted it "to formulate proposals." (Tr. 25). This is despite the fact that he and Gianatasio had many discussions and sidebars about the information requests. (Tr. at 124), (ALJD at 7). Even the bare-bones rationale he offered of needing it to know "what was being paid" was said only at the hearing, and not demonstrated to have been said during the bargaining itself, when it was required.

While the judge was able to suggest explanations for why the information might have been needed to "formulate proposals," the Union failed to do so. All that remains is therefore the type of "surmise, conjecture or speculation" which is not sufficient to satisfy the Union's burden under Board case law. Dodger Theatricals, 347 NLRB at 967.

B. THE ADMINISTRATIVE LAW JUDGE ERRED WHEN HE REJECTED AND FAILED TO CONSIDER RESPONDENT'S PROPOSED EXHIBIT 5

As its proposed Exhibit 5, FirstEnergy submitted a Complaint, a class action lawsuit, filed in the United States District Court for the Northern District of Ohio, Eastern Division. (Tr. 129). The lawsuit involved the same parties: It was filed against FirstEnergy, and it was brought on behalf of retirees who were represented by the Union. (Tr. 130). The Complaint is styled "Complaint for Violation of labor Contracts and ERISA Plan."

The issues involved in that case greatly overlap with the instant matter. Yet the administrative law judge summarily rejected the proposed Exhibit. He did not even allow FirstEnergy the opportunity to question its witness about the Exhibit. Plainly the matter is probative to this case because the bargaining was conducted, and the information request made, in the months prior to the lawsuit being filed. Similar situations have arisen before, and the Board has made clear that a request for information in support of a lawsuit is not a legitimate request for information. Southern California Gas Co., 342 NLRB 613 (2004); Unbelievable, Inc., 318 NLRB 857 (1995).

Had FirstEnergy been permitted to introduce its Exhibit, the evidence may have shown that the information was not genuinely necessary for the bargaining, and was instead requested only as part of preparation for the lawsuit. Although the mere possibility of that fact is sufficient under the Board's due process obligations to use of the Exhibit at the hearing, here it is more than just a possibility. As stated above, the information was not provided in 2009--when

no lawsuit was pending – and the Union did not object. When a union is bargaining at the very same time it is preparing a lawsuit against an employer, especially when the same subject matter – retiree benefits – is involved in both, there is a highly distinct possibility that an information request is only in support of the latter. FirstEnergy therefore submits that the administrative law judge erred when he rejected and failed to consider this proposed Exhibit.

VI. CONCLUSION

For all of the above reasons, FirstEnergy submits that the administrative law judge erred in his conclusion that the Union satisfied its burden of demonstrating the relevance of the requested information. The Board should therefore refuse to adopt the Decision and Order of the administrative law judge which found that FirstEnergy violated the Act, and should instead dismiss this portion of the Complaint in its entirety.[3]

Respectfully submitted,

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[3] The administrative law judge recommended dismissal of another allegation in the Complaint regarding an unrelated information request.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing *Respondent's Brief in Support of Exceptions to the Decision of the Administrative Law Judge* was served upon the following this 20th day of February, 2015, by electronic mail and United States Postal Service, first class, postage prepaid:

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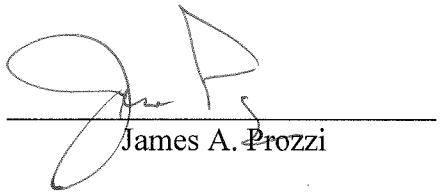

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